

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs July 21, 2004

MICHAEL WAYNE PERRY v. STATE OF TENNESSEE

Appeal from the Criminal Court for Wilson County
Nos. 97-1173, 97-1173A J. O. Bond, Judge

No. M2003-02510-CCA-R3-PC - Filed August 25, 2004

The petitioner, Michael Wayne Perry, appeals from the Wilson County Criminal Court's denial of his petition for post-conviction relief from his conviction for first degree murder and resulting sentence of life in prison without the possibility of parole. He contends that the trial court erred in denying his motion for a continuance. We reverse the judgment of the trial court and remand the case for further proceedings.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Reversed;
Case Remanded**

JOSEPH M. TIPTON, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER, J., and JOE G. RILEY, SP. J., joined.

Harry A. Christensen, Lebanon, Tennessee, for the appellant, Michael Wayne Perry.

Paul G. Summers, Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; Tom P. Thompson, Jr., District Attorney General; and Robert N. Hibbett, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The petitioner was convicted for the first degree murder of Cynthia Boyle on July 28, 1999, and this court affirmed the conviction. See State v. Michael Wayne Perry, No. M1999-01832-CCA-R3-CD, Wilson County (Tenn. Crim. App. Apr. 6, 2001). On July 26, 2002, the petitioner filed a pro se petition for post-conviction relief. The trial court appointed counsel to represent the petitioner, and counsel filed an amended petition, alleging prosecutorial misconduct, ineffective assistance of counsel, an inappropriate burden of proof standard, and other matters previously raised in the petitioner's direct appeal.

On the date of the hearing for post-conviction relief, the following exchange occurred:

[PETITIONER'S ATTORNEY]: Your Honor, a preliminary matter.

Mr. Perry has expressed dis[s]atisfaction with my representation, and I would like to move to the Court to have me replaced--

THE COURT: He may represent himself if he doesn't want you, otherwise he has you.

[PETITIONER]: I would rather represent myself, Your Honor.

THE COURT: Let's go then. You understand I've appointed you a lawyer, he's done what he's supposed to do.

[PETITIONER]: He hasn't done what I asked him to do, Your Honor. I got me some Constitutional violations that I need added to my petition, I couldn't get him to do it. I've written him several letters, I have copies of the letters here, and his responses that he wouldn't put them in there, Your Honor.

THE COURT: Well, he's an officer of this court, if you put something in that you asked him to do that he doesn't feel that, as a representative of this court, a court officer, which he is. All defense lawyers are court officers as well as state prosecutors, they are all court officers. If they don't think they have a legitimate basis they don't use it. So that's where we are. And it's too late to file any additional as far as I'm concerned. So we're ready to go.

[PETITIONER]: I refuse to go any further with this counsel here, Your Honor, and I need a little time to get my new petition drawn up.

THE COURT: If you want me to deny your petition now saying you're not ready to go forward, you won't go forward, you'll never get another opportunity.

[PETITIONER]: I can't go forward--

THE COURT: You can appeal what we do here today, but if you tell me you're not going forward with your petition--

[PETITIONER]: Not with this attorney here, Your Honor. I just need a little time in order to-- on the record I'm asking for a new attorney and--

THE COURT: Denied. If you're not going forward with your petition, that's all there is to it.

Although the petitioner's issue on appeal is the lack of a continuance, we believe the record reflects that it is entwined with the means by which the trial court released counsel from his duty to represent the petitioner. The standard of review is whether the trial court abused its discretion. See Leslie v. State, 36 S.W.3d 34, 37 (Tenn. 2000).

While a petitioner has no post-conviction constitutional right to counsel, the legislature has provided for such a right by statute. See T.C.A. § 40-30-107(b)(1); Leslie, 36 S.W.3d at 38. Our Supreme Court has stated the duties of a post-conviction attorney as follows:

Appointed or retained counsel shall be required to review the pro se petition, file an amended petition asserting other claims which the petitioner arguably has or a written notice that no amended petition will be filed, interview relevant witnesses, including petitioner and prior counsel and diligently investigate and present all reasonable claims.

Tenn. Sup. Ct. R. 28, § 6(C)(2) (emphasis added). Counsel is also required to file a certification affirming that the attorney has discussed the possible constitutional violations with the petitioner and has raised all non-frivolous constitutional grounds. Id. at § 6(C)(3). These provisions in support of the 1995 Post-Conviction Procedure Act focus upon ensuring that all potential grounds for relief that a petitioner may have will be aired fully and fairly in one proceeding and decided upon their merits.

However, when a petitioner seeks and obtains the aid of counsel through court appointment, the petitioner needs to understand that the right to make the large majority of the decisions relating to the conduct of the case then rests with the attorney. The attorney "is in no way obligated to comply with a petitioner's demands to investigate or pursue unreasonable or frivolous claims." Leslie, 36 S.W.3d at 38. Hence, a petitioner who abuses the post-conviction process may be denied a remedy. Id. at 39 (citing Cazes v. State, 980 S.W.2d 364, 365 (Tenn. 1998)).

When a defendant seeks to substitute appointed counsel, he has the burden of establishing to the satisfaction of the trial judge good and valid reasons for the dismissal of his attorney. See State v. Gilmore, 823 S.W.2d 566, 568 (Tenn. Crim. App. 1991); see also United States v. Iles, 906 F.2d 1122, 1130 (6th Cir. 1990) (stating, "It is hornbook law that when an indigent defendant makes a timely and good faith motion requesting that appointed counsel be discharged . . . , the trial court clearly has a responsibility to determine the reasons for [the] dissatisfaction") (internal quotation omitted). This same standard has been applied in post-conviction cases. Oudon Panyanouvong v.

State, No. M2000-03152-CCA-R3-PC, Rutherford County, slip op. at 4 (Tenn. Crim. App. July 18, 2001). This burden can be satisfied by a showing that “(a) the representation being furnished by counsel is ineffective, inadequate, and falls below the range of competency expected of defense counsel in criminal prosecutions, (b) the accused and appointed counsel have become embroiled in an irreconcilable conflict, or (c) there has been a complete breakdown in communications between them.” Gilmore, 823 S.W.2d at 568-69. The decision of whether to substitute counsel is within the sound discretion of the trial court. Id.

At the post-conviction hearing, the petitioner refused to proceed with his appointed counsel because he alleged appointed counsel failed to include constitutional violations in the petition. We note the record is devoid of the fact that the petitioner’s counsel filed the required certification, which should have stated that he had discussed all possible constitutional grounds with the petitioner and that he had raised all non-frivolous constitutional grounds in the amended complaint. The trial court, after briefly explaining the ethical obligations of the petitioner’s counsel as an officer of the court, denied the petitioner’s request for a continuance and dismissed the complaint.

We believe the trial court abused its discretion in not inquiring into whether the petitioner had good and valid reasons for the dismissal of his attorney. In this context, the trial court should not have summarily removed counsel and required the petitioner to proceed, pro se, with the hearing in his case. Therefore, we reverse the judgment of the trial court and remand this case for further proceedings consistent with this opinion.

JOSEPH M. TIPTON, JUDGE